# THE INEVITABLE BACKLASH TO GLOBALIZATION: WHY FREE TRADE HAS TO WORK FOR EVERYONE

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For decades, economists have praised the benefits of liberalized trade: increased economic growth; increased efficiency and innovation; access to higher quality, lower-priced goods, and services; and greater global equality. While reductions in tariffs and other trade barriers have spurred economic growth worldwide, the resulting economic redistribution threatens to undo the system of liberalized trade envisioned by the World Trade Organization ("WTO") and the Bretton Woods institutions. This Article discusses the history and foundation of the WTO and how the political consensus on liberalized trade led to an overestimation of its benefits. This Article addresses the inequitable distribution of the wealth created by free trade and the implications of ignoring such wealth discrepancies on the future of the WTO and international trade. Finally, this Article argues that States must address wealth distribution problems and that the WTO and its Member States must adopt a more permissive stance in allowing Member States to enact policies to protect those citizens left behind by free trade.

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1. Vanderbilt University Law School, J.D., Class of 2019. I would like to thank Professor Timothy Meyer, of Vanderbilt University Law School, for his invaluable mentorship and guidance in writing this Article, as well as the staff of the Michigan State International Law Review, for their tireless work in helping prepare this Article for publication.

## I. INTRODUCTION: THE DEATH OF FREE TRADE?

The impact of free trade on domestic economies has been one of the defining global themes of the past few years. In the United States, Democrats[2] and Republicans[3] alike disparage free trade agreements. Voters in the United Kingdom, weary of the perceived effects of globalization on the country, elected to leave the European Union, a move that will likely make a substantial impact on world trade.[4] In Europe, tens of thousands took to the streets to protest the Transatlantic Trade and Investment Partnership (TTIP) and the Comprehensive Economic and Trade Agreement.[5] The year 2016 ended with a fatal blow for free trade agreements, as the election of Donald Trump signaled an end to the TTIP negotiations[6] and the withdrawal of the United States from the Trans-Pacific Partnership.[7] Fears that the World Trade Organization's ("WTO") system of free trade could be undermined by increased unilateral action have only intensified as the United States and

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2. Nicole Gaudiano, *Bernie Sanders Pledges to Rewrite 'Disastrous' Trade Deals*, USA TODAY (Mar. 31, 2016, 2:24 PM), https://www.usatoday.com/story/news/politics/onpolitics/2016/03/31/bernie-sanders-pledges-rewrite-disastrous-trade-deals/82473012/;Michael A. Memoli, *Hillary Clinton Once Called TPP the 'Gold Standard.' Here's Why, and What She Says About the Trade Deal Now*, L.A. TIMES (Sept. 26, 2016, 7 PM), http://www.latimes.com/politics/la-na-pol-trade-tpp-20160926-snap-story.html.

3. S.A. Miller, *Trump Vows to Cancel Asia Trade Deal as President—and Puts NAFTA on Notice*, WASH. TIMES (June 28, 2016), http://www.washingtontimes.com/news/2016/jun/28/donald-trump-vows-to-cancel-trans-pacific-partners/.

4. Shawn Tully, *Here's What Brexit Voters Should Know About Free Trade*, FORTUNE (June 23, 2016, 12:45 PM), http://fortune.com/2016/06/23/brexit-free-trade/.

5. Michael Nienaber, *Tens of Thousands Protest in Europe Against Atlantic Free Trade Deals*, REUTERS (Sept. 17, 2016, 10:42 AM), http://www.reuters.com/article/us-eu-usa-ttip/tens-of-thousands-protest-in-europe-against-atlantic-free-trade-deals-idUSKCN11N0H6.

6. Samuel Osborne, *Angela Merkel Suggests TTIP Trade Deal Won't be Concluded Under Barack Obama's Presidency*, INDEPENDENT (Nov. 17, 2016, 5:49 PM), http://www.independent.co.uk/news/world/politics/ttip-on-hold-angela-merkel-barack-obama-trade-deal-latest-a7423446.html.

7. Ylan Q. Mui, *President Trump Signs Order to Withdraw from Trans-Pacific Partnership*, WASH. POST (Jan. 23, 2017, 2:10 PM), https://www.washingtonpost.com/news/wonk/wp/2017/01/23/president-trump-signs-order-to-withdraw-from-transpacific-partnership/.

China engage in a potentially destabilizing trade war,[8] and the United States continues to block new judges from being appointed to the WTO Appellate Body ("AB").[9]

The liberalization of trade has gone relatively unchallenged since the end of World War II. Economists were, and still are, largely in agreement that reducing tariffs and ending protectionist policies leads to an expansion of markets, ultimately creating net benefits for all countries and, in turn, their citizens.[10] However, a growing body of scholarship suggests that, particularly since the late 1980s, trade liberalization, while increasing overall gains, has benefitted certain groups to the detriment of others.[11]

This Article examines the reasons that trade liberalization has come under closer scrutiny in recent years. Part II explores the background and workings of the WTO. It discusses how changing demographics within the WTO and the ascension of developing countries like China, India, and Brazil have shifted the balance of power in world trade. Part III examines the "winners" and "losers" of trade liberalization and how growing disparities between these groups has led to a distrust of free trade and international organizations such as the WTO. The Article argues that if policymakers refuse to address the fundamental distributional problems that accompany free trade, the WTO and underlying principles of trade liberalization will come under further

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8. John Cassidy, *Trump's Trade War Could Make the Trump Recession a Reality*, NEW YORKER (Aug. 15, 2019), https://www.newyorker.com/news/our-columnists/trumps-trade-war-could-make-the-trump-recession-a-reality.

9. John Brinkley, *Trump Is Close to Shutting Down the WTO's Appeals Court*, FORBES (Sept. 27, 2018, 2:42 PM), https://www.forbes.com/sites/johnbrinkley/2018/09/27/trump-is-close-to-shutting-down-the-wtos-appeals-court/#556d3cf77ab6.

10. *See* Dennis Froning, *The Benefits of Free Trade: A Guide for Policymakers*, HERITAGE FOUND. (Aug. 25, 2000), https://www.heritage.org/trade/report/the-benefits-free-trade-guide-policymakers ("[T]he benefits of free trade extend well beyond American households. Free trade helps to spread the value of freedom, reinforce the rule of law, and foster economic development in poor countries."); James McBride & Mohammed Aly Sergie, *NAFTA's Economic Impact*, COUNCIL ON FOREIGN REL. (OCT. 1, 2018), https://www.cfr.org/backgrounder/naftas-economic-impact.

11. *See, e.g.*, DANI RODRIK, THE GLOBALIZATION PARADOX (2011); DANI RODRIK, HAS GLOBALIZATION GONE TOO FAR (1997); IAN FLETCHER, FREE TRADE DOESN'T WORK (2009); Branko Milanovic, *Global Income Inequality by the Numbers: in History and Now* (World Bank Dev. Research Grp., Working Paper No. 6259, 2012).

attack from protectionist ideologues. Part IV offers solutions to minimize the disparity between the "winners" and "losers" of free trade. It analyzes the likely interaction between each solution and WTO rules and predicts the likelihood of the solutions withstanding the purview of the AB.

## II. BACKGROUND

The WTO and other free trade agreements ("FTAs") are founded on the principle that "liberal trade policies—policies that allow the unrestricted flow of goods and services—sharpen competition, motivate innovation and breed success."[12] The theory that free trade is advantageous to society dates back to the classical economist David Ricardo, who posited that free trade would lead countries to produce goods and services that they could manufacture at a comparative advantage or a lower opportunity cost than other economic actors.[13]

The following scenario illustrates how comparative advantage works. As shown in Figure 1, if each country produces only one good, Country A can produce thirty million automobiles or twenty million televisions, and Country B can produce thirty-five million automobiles or sixty million televisions. Thus, Country B has an absolute advantage in producing both automobiles and televisions—that is, Country B is superior at producing *both* automobiles and televisions. Country B also has a comparative advantage in producing televisions, because it is relatively better at producing televisions than automobiles. Country B is three times better at producing televisions, but only 1.17 times better at producing automobiles than Country A. While Country B still has an absolute advantage in producing automobiles, Country B does not have a comparative advantage in producing automobiles because the opportunity cost[14] of producing one car would be two televisions, while

12. *The Case for Open Trade*, WTO, https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact3_e.htm (last visited Feb. 9, 2020).

13. *Free Trade in Economic Theories*, EXPLORING ECON. (2016), https://www.exploring-economics.org/en/discover/free-trade-economic-theories/.

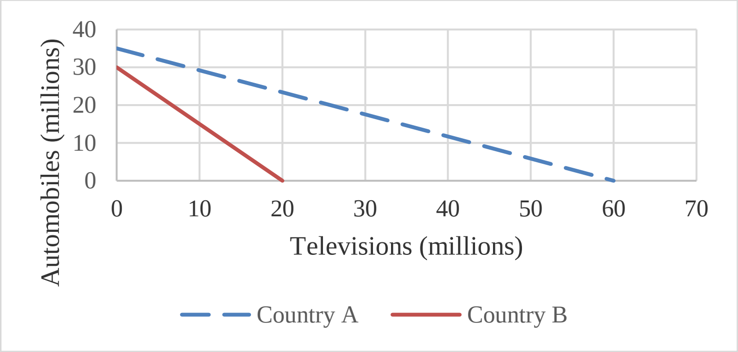
14. Opportunity costs represent the benefits an individual, investor, or business *misses out on* when choosing one alternative over another.

Country A would only bear an opportunity cost of 0.67 televisions for every automobile it produces.[15]

*Figure 1*. Production Capabilities of Country A and Country B

| | Country A | Country B |
|---|---|---|
| Automobiles | 30 million | 35 million |
| Televisions | 20 million | 60 million |

*Figure 2*. Comparative Advantage in Country A and Country B




The greatest advantage, reflected in Figure 2 as the widest gap, lies with Country B's television production. If countries A and B allocate resources evenly to both goods, the combined output is: Automobiles = 15 + 17.5 = 32.5; Televisions = 10 + 30 = 40. Therefore, the total combined output for both countries would be 72.5 million automobiles and televisions. However, if both countries specialize based on their comparative advantage, Country B would manufacture only televisions, while Country A would manufacture only automobiles. The total output in this scenario would be ninety million automobiles and televisions,

15. This relies on the assumption that the production of one automobile and one television is of equal social and economic value to a country.

where Country A produces thirty million automobiles and Country B produces sixty million televisions.[16]

From the viewpoint of the WTO and many economists, comparative advantage proves that both countries can benefit from trade even if one is better at producing any and all goods and services than the other country.[17] By specializing, countries maximize their production capabilities, leading to cheaper prices in goods and benefitting society.[18] What these economists have ignored, however, is that while liberalized trade has led to increased production and overall wealth,[19] the distributional gains of this wealth have largely benefitted the world's wealthiest citizens.[20] Further, as economist Richard Baldwin has shown, the gains from globalization have been concentrated in just six countries.[21]

### A. From the GATT to the WTO

The greatest driving force of liberalized trade has been the WTO and its precursor, the General Agreement on Tariffs and Trade ("GATT").[22] Following World War II, both the United States and European countries

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16. *See* *Comparative Advantage*, ECON. ONLINE, http://www.economicsonline.co.uk/Global_economics/Comparative_advantage.html (last visited Feb. 9, 2020).

17. Morgan Rose, *A Brief History of the Concept of Comparative Advantage*, LIBR. ECON. & LIBERTY (Aug. 6, 2001), http://www.econlib.org/library/Columns/Teachers/comparative.html.

18. *See* Donald J. Boudreaux & Nita Ghei, *The Benefits of Free Trade: Addressing Key Myths*, MERCATUS CTR. (May 23, 2018), https://www.mercatus.org/publication/benefits-free-trade-addressing-key-myths.

19. *See* IMF Staff, *Global Trade Liberalization and the Developing Countries*, Int'l Monetary Fund (Nov. 8, 2001), https://www.imf.org/external/np/exr/ib/2001/110801.htm ("Estimates of the gains from eliminating all barriers to merchandise trade range from US$250 billion to US$680 billion per year.").

20. *See* Nikil Saval, *Globalisation: The Rise and Fall of an Idea that Swept the World*, GUARDIAN (July 14, 2017, 12:28 AM), https://www.theguardian.com/world/2017/jul/14/globalisation-the-rise-and-fall-of-an-idea-that-swept-the-world.

21. *Id.*

22. General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A3, T.I.A.S. No. 1700 [hereinafter GATT].

sought to expand international trade.[23] The GATT resulted from a failed attempt to create the International Trade Organization ("ITO"), whose charter was to have a much broader scope, covering issues such as full employment, fair labor standards, commodity agreements, economic development, and restrictive business practices.[24] However, fearing "incursions into US sovereignty and influenced by domestic business groups that objected to the ITO's 'exceptions to free market principles,'" Congress refused to ratify the ITO.[25] As a result, the GATT, which focused narrowly on reducing tariffs, was left to govern trade.[26]

The original signatories to the GATT were a group of like-minded, developed countries with market economies.[27] The GATT benefitted these countries, as it provided a framework to negotiate lower tariffs and curtail protectionist measures.[28] While the GATT did not completely ban tariffs, it attempted to do so through a "process of gradual reduction of tariffs on a country-by-country, product-by-product basis."[29] Article II of the GATT commits contracting parties to binding tariff ceilings, or "bound rates."[30] Once a country negotiates a new bound rate for a particular good or service, they may not increase that bound rate unless, through negotiation with other GATT members, they agree to further lower tariffs on other goods or services.[31] In addition to these bound rates, the GATT requires that parties provide both national treatment,

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23. *See* KRISTEN HOPEWELL, BREAKING THE WTO: HOW EMERGING POWERS DISRUPTED THE NEOLIBERAL PROJECT 42–43 (2016).

24. *Id.* at 43–44.

25. *Id.* at 44 (citing Robert E. Baldwin, *Failure of the WTO Ministerial Conference at Cancun: Reasons and Remedies*, 29 World Econ. 677, 679 (2006)).

26. *Id.*

27. The original signatories were: Australia, Belgium, Brazil, Burma, Canada, Ceylon, Chile, China, Cuba, Czechoslovakia, France, India, Lebanon, Luxembourg, Netherlands, New Zealand, Norway, Pakistan, Southern Rhodesia, Syria, South Africa, United Kingdom and the United States. *See* Press Brief, WTO, Fiftieth Anniversary of the Multilateral Trading System,https://www.wto.org/english/thewto_e/minist_e/min96_e/chrono.htm (last visited Feb. 9, 2020).

28. *See* Will Kenton, General Agreement on Tariffs and Trade, INVESTOPEDIA (June 28, 2018), https://www.investopedia.com/terms/g/general-agreement-on-tariffs-and-trade-gaat.asp.

29. JOOST PAUWELYN ET AL., INTERNATIONAL TRADE LAW 181 (3d ed. 2016).

30. *Id.* at 183.

31. *See* GATT, *supra* note 22, art. XXVIII, at A71–72; PAUWELYN ET AL., *supra* note 29, at 186–87.

under Article III, and most favored nation (MFN) status, under Article I, to all other GATT members, as well as eliminate all quantitative restrictions on trade, such as import and export quotas.[32]

National treatment forbids countries from enacting internal taxes or regulations on imported goods that do not also apply to similar and directly competitive or substitutable ("DCS") domestic products.[33] This means that if a country were to impose an internal tax on the sale of imported scotch, but not domestic bourbon, the tax would likely violate the GATT because scotch and bourbon are similar products.[34] Similarly, the MFN principle requires member states to offer imports (and exports) the same treatment offered to any other country.[35] For example, under the MFN principle, it would be GATT-inconsistent for Germany to apply a higher tariff, or impose any other less favorable treatment, on a product from China than is applied to a like product from the United States. Finally, Article XI forbids the use of any non-tariff barriers to trade.[36] The AB has interpreted Article XI broadly to include any state action other than tariffs that would disadvantage imports or exports.[37] The principles laid out in the GATT remain in effect today for WTO member states, as the WTO adopted the GATT as part of its legal framework.[38]

The rules set out under the GATT succeeded in encouraging countries to negotiate with each other to lower tariffs. Since the GATT went into effect in 1948, average tariffs are less than a tenth of what they were at the time of its enactment.[39]

However, the GATT had one fatal flaw preventing it from truly being able to liberalize trade: its lack of a meaningful enforcement mechanism. While GATT members essentially agreed not to exceed their tariff bound

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32. *See* GATT, *supra* note 22, art. I, III, XI.

33. *Id.* art. III.

34. *See* Appellate Body Report, *Japan – Taxes on Alcoholic Beverages*, at 31–32, WTO Doc. WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R (adopted Nov. 1, 1996) (holding that vodka and shochu were similar products and that shochu and foreign liquors such as rum, whiskey, and gin were DCS, and therefore, Japan's higher taxes on foreign liquors were GATT inconsistent).

35. GATT, *supra* note 22, art. I.

36. *Id.* art. XI.

37. PAUWELYN ET AL., *supra* note 29, at 220.

38. *See* General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, 1867 U.N.T.S. 190.

39. *Fifty Years On*, ECONOMIST (May 14, 1998), http://www.economist.com/node/128462.

rates and not to discriminate against other countries, a country could stray from its commitments without fear of punishment. Under the GATT system, respondents in a dispute settlement proceeding essentially had a veto that enabled losing parties to prevent the adoption of rulings against them.[40] While losing parties generally adopted these rulings, the rulings did not mean that Member States always kept their commitments.[41] Because the dispute panels were aware that a losing party could choose to block the adoption of a ruling, the panel had an incentive to rule in a somewhat more diplomatic way.[42] Therefore, rulings were more lenient towards a country found violating the GATT because harsher pronouncements might have led to a country blocking adoption of a ruling.[43] This resulted in countries eschewing the GATT dispute settlement system in favor of taking direct unilateral action against a party they believed violated GATT rules.[44]

Thus, one of the major innovations of the WTO is a significantly strengthened dispute settlement system. The Dispute Settlement Body ("DSB") automatically adopts decisions made by panels and the AB unless there is a consensus not to do so.[45] The adoption of automatically implementing panel reports and AB decisions by "negative consensus" forecloses a country's ability to block the DSB's decisions and circumvent WTO law unilaterally.[46] The DSB's power to automatically impose its rulings on a country in non-compliance under the GATT eliminates the need for panels and the AB to be overly diplomatic

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40. *The System Under GATT 1947 and Its Evolution over the Years*, WTO (Nov. 2003), https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c2s1p1_e.htm.

41. *Historic Development of the WTO Dispute Settlement System*, WTO (Nov. 2003), https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c2s1p1_e.htm.

42. *The System Under GATT 1947 and Its Evolution over the Years*, *supra* note 40.

43. *Id.*

44. *Id.*

45. Understanding on Rules and Procedures Governing the Settlement of Disputes arts.16(4), 17(14), Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S 401, 411, 413 [hereinafter DSU].

46. *Major Changes in the Uruguay Round*, WTO (Nov. 2003), https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c2s2p1_e.htm.

because the losing party in a dispute no longer has the power to block rulings unilaterally.[47]

While the WTO's revised governance system and expanded coverage has proven effective in ensuring contracting parties' compliance with the GATT, it has the unfortunate effect of limiting countries from a sovereignty perspective. Parties to the WTO can no longer choose to adopt economic policies that are most beneficial to their country; they must instead make sure that their tariff systems, internal taxes, and regulations do not violate the GATT.[48] Moreover, when a country does enact a policy that violates the GATT, it faces the suspension of benefits from the country claiming a violation of its rights under WTO law.[49]

While it may only seem fair that a country that violates its obligations should face consequences for violating an agreement, the current structure of obligations is such that many long-term parties to the GATT and WTO are subject to much stricter obligations, while newer members have more policy space in which to adjust their tariffs.[50] Those countries that were original signatories of the GATT made either bilateral or multilateral concessions to each other when lowering tariffs and removing other trade barriers.[51] Though new members may ultimately make some concessions in becoming signatories to the GATT, the MFN principle

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47. PAUWELYN ET AL., *supra* note 29, at 129.

48. *See, e.g.*, Joann Ezeoba, *The Rhetoric of Sovereignty in the WTO: How Sovereignty Can Impact State Conduct in the Dispute Settlement Framework*, 7 CREIGHTON INT'L & COMP. L.J. 182, 184-85 (2016) (discussing how the DSU is designed to reduce the sovereignty of WTO member States); Soyoung Jung, *A State's Sovereign Rights and Obligations in the WTO to Harmonize Environmental Policies*, 21 MICH. ST. INT'L L. REV. 461, 470–72 (2013) (discussing how the WTO affects countries' rights to implement national environmental and economic policies).

49. DSU, *supra* note 45, art. 22.

50. *Bound Rate, Simple Mean, All Products (%)*, WORLD BANK, https://data.worldbank.org/indicator/TM.TAX.MRCH.BR.ZS (last visited Mar. 16, 2020) (The average tariff bound rate of long standing members of the WTO such as the United States, Japan, Canada, and EU members is generally below 5%, while the bound rates of many newer members of the WTO, especially those who would be classified as developing countries, have average bound rates of at least 10% and are often much higher. For example, Brazil's average tariff bound rate exceeds 31%, and India's exceeds 50%).

51. *See* PAUWELYN ET AL., *supra* note 29, at 89 (stating that while industrialized countries continued to negotiate lower tariffs and additional side agreements to the GATT, many contracting parties, particularly developing countries had bound relatively few of their tariff lines).

creates a strong incentive for new members to freeride on the concessions previously made by founding members.[52] Thus, a country with higher tariff bound rates has little incentive to renegotiate lower tariff rates because developed countries, which often have the lowest tariff bound rates, must extend these tariff rates unconditionally, whether or not a particular country has reciprocally lowered its tariffs.[53] For major exporting countries in the developing world, it makes little sense to reduce tariffs.[54] The world's major consumer markets are already those with the lowest tariffs.[55] Those major export producing countries can, therefore, take advantage of the low tariffs in these markets, while still levying higher tariffs on imports from developed countries. Unsurprisingly, many of the countries whose economies have grown the fastest over the past few decades have been those benefitting from the MFN principle without having made equal tariff reductions themselves.[56] The following two figures show the GDP growth and the applied tariff rates of all products in three developing countries—China, Vietnam, and India—and three developed countries—the United States, Germany, and Japan.[57] Note that the countries that experienced the greater growth in Gross Domestic Product (GDP) from 1988 to 2016 were those countries that applied a higher mean tariff rate during that same period.[58]

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52. Rodney D. Ludema & Anna Maria Mayda, *Do Countries Free Ride on MFN?* 77 J. INT'L ECON. 137, 144 (2009) (suggesting that absent the MFN clause, tariff rates would be two thirds of their current level).

53. *See* GATT, *supra* note 22, art. I.

54. *See* Rodney D. Ludema & Anna Maria Mayda, *Do Terms-of-Trade Effects Matter for Trade Agreements? Theory and Evidence from WTO Countries*, 128 Q.J. ECON. 1837, 1844 (2013) (affirming that countries making unilateral tariff reductions have had very little success in getting other countries to lower their tariffs).

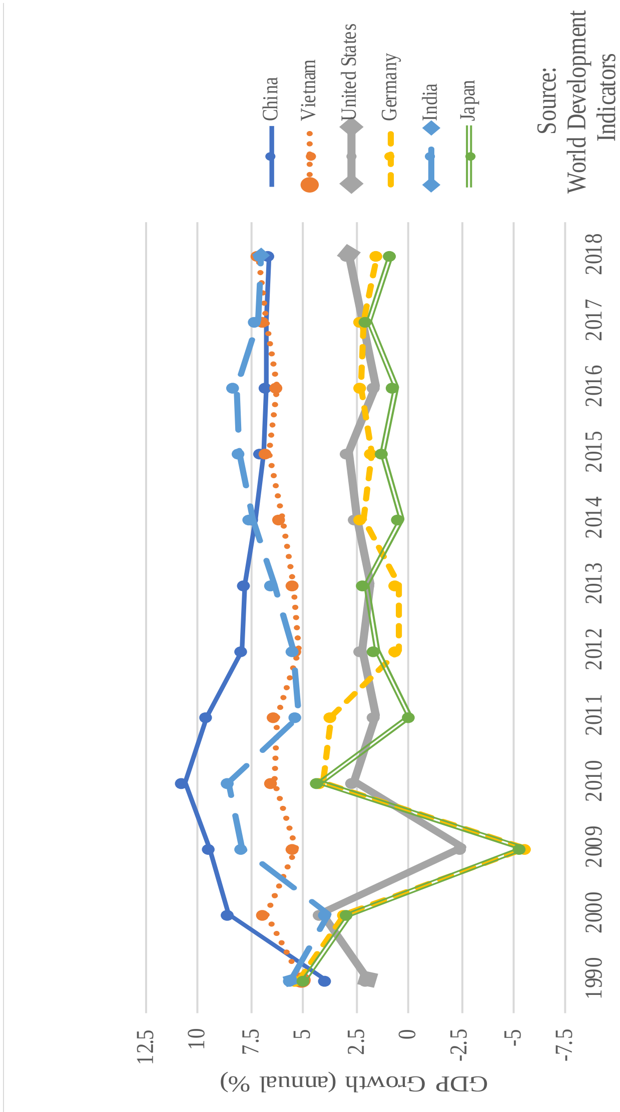
55. *Compare The World Factbook – Imports,* CIA, https://www.cia.gov/library/publications/resources/the-world-factbook/fields/242rank.html (last visited Mar. 16, 2020), *with Bound Rate, Simple Mean, All Products (%), supra* note 50.

56. *See, e.g.*, Dani Rodrik, *How to Save Globalization from Its Cheerleaders* 2 (Harvard Univ. John F. Kennedy Sch. of Gov't, Working Paper No. RWP07-038, 2007), https://drodrik.scholar.harvard.edu/files/dani-rodrik/files/how-to-save-globalization-from-cheerleaders.pdf.

57. *Infra* notes 58–59 and accompanying graphic figures.

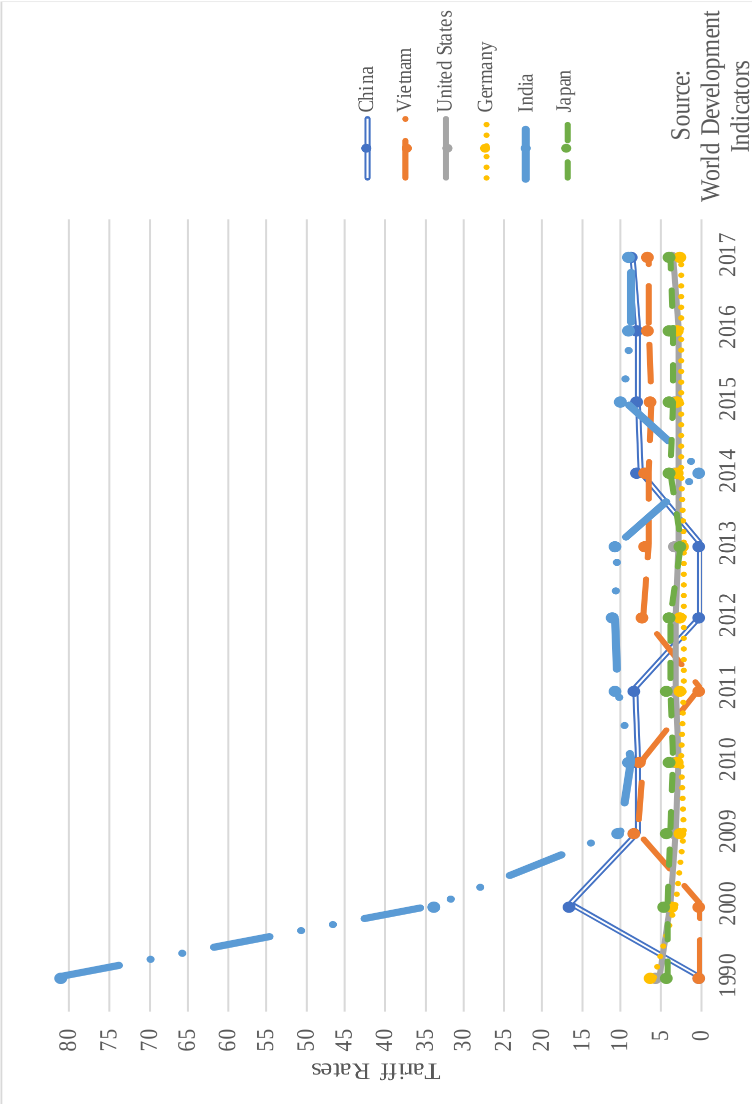
58. *Infra* notes 58–59 and accompanying graphic figures.

*Figure 3*. GDP growth from 1988 to 2016[59]




59. *World Development Indicators: GDP Growth*, WORLD BANK, (last visited Mar. 16, 2020).

*Figure 4*. Tariff Rates Applied, Simple Mean, All Products (%)[60]




60. *World Development Indicators: Tariff Rate, Applied, Simple Mean, All Products*, WORLD BANK, http://databank.worldbank.org/data/reports.aspx?source=2&series=TM.TAX.MRCH.SM.AR.ZS&country=CHN,VNM,USA,DEU,IND,JPN (last visited Mar. 16, 2020).

This has led developed countries such as the United States and members of the European Union to negotiate bi-lateral and multi-lateral FTAs in order to gain concessions they cannot get through the WTO.[61] Some observers see this proliferation of FTAs as detrimental to the poorest people in developing countries.[62] Others view these trade agreements as benefitting the interests of large corporations at the expense of the working class in developed countries.[63]

## B. The WTO, the Environment, and Sovereignty

A majority of the early WTO jurisprudence centered on trade and environment.[64] This was the result of a rise in political concern for the environment[65] combined with the WTO's lack of any specific agreement dealing with the environment.[66] Though the WTO lacks any specific environmental agreement, GATT Article XX provides a number of exceptions relating to environmental protection.[67] In particular, Article XX(b)—measures necessary to protect human, animal or plant life—and

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61. *Spread of Free Trade Agreements Threatens Poor Countries*, OXFAM (Mar. 19, 2007), https://www.oxfamamerica.org/press/spread-of-free-trade-agreements-threatens-poor-countries/.

62. *Id.*

63. *See* David Korten, *What If Trade Agreements Helped People, Not Corporations?*, YES! MAG. (June 1, 2016), http://www.yesmagazine.org/new-economy/what-if-trade-agreements-helped-people-not-corporations-20160601 (noting that existing and proposed free trade agreements benefit corporate interests at the expense of democracy and the environment); Zaid Jilani, *Despite What Media Says, TPP Isn't About Free Trade—It's About Protecting Corporate Profits*, INTERCEPT (July 5, 2016, 10:25 AM), https://theintercept.com/2016/07/05/despite-what-media-says-tpp-isnt-about-free-trade-its-about-helping-corporations/.

64. *See, e.g.*, Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WTO Doc. WT/DS58/AB/R (adopted Nov. 6, 1998) [hereinafter *US–Shrimp*]; Appellate Body Report, *United States – Measures Concerning the Importation, Marketing, and Sale of Tuna and Tuna Products*, WTO Doc. WT/DS381/AB/R (adopted June 13, 2012).

65. JEFFREY FRANKEL & PETER ORSZAG, RETROSPECTIVE ON AMERICAN ECONOMIC POLICY IN THE 1990'S 3 (2001), https://www.brookings.edu/wp-content/uploads/2016/06/20011102.pdf.

66. *The Environment: A Specific Concern*, WTO, https://www.wto.org/english/thewto_e/whatis_e/tif_e/bey2_e.htm (last visited Apr. 20, 2020).

67. GATT, *supra* note 22, art. XX.

Article XX(g)—measures relating to the conservation of exhaustible natural resources—are GATT consistent so long as they are "not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination" or "a disguised restriction on international trade."[68] However, the lack of clarity in how to interpret Article XX made it unclear what kind of trade-restrictive environmental regulations and taxes a country could enact.

The newly established DSB chose to interpret the Article XX exceptions very narrowly, requiring that a country's policy falls within the range of policy exceptions allowed by the GATT and that the measure be applied in conformity with the requirements of the introductory clause of Article XX, or the chapeau.[69] As this Article discusses in Part IV, the chapeau requires that a measure not be applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination, or a disguised restriction on international trade; the requirement has proven difficult to comply with, severely limiting the ability of a country to exercise sovereignty over its domestic policies.[70]

The leading case in interpreting the chapeau is *United States – Import Prohibition of Certain Shrimp and Shrimp Products* ("*US–Shrimp*").[71] The measure at issue was a United States regulation requiring shrimp to be caught with "turtle excluder devices" ("TEDs") in order to be imported into the United States.[72] India, Malaysia, Pakistan, and Thailand argued that the ban on shrimp caught without TEDs violated GATT Articles I , XI, and XIII.[73] The United States conceded that the measure was enacted in violation of the GATT but argued that it qualified as an exception under Article XX(g).[74] The AB held that the measure amounted to both unjustifiable and arbitrary discrimination.[75] The AB

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68. *Id.*

69. Panel Report, *United States – Standards for Reformulated and Conventional Gasoline*, WTO Doc. WT/DS2/R (adopted May 20, 1996) [hereinafter *US–Gasoline* Panel].

70. GATT, *supra* note 22, art. XX; Sanford Gaines, *The WTO's Reading of the GATT Article XX Chapeau: A Disguised Restriction on Environmental Measures,* 22 U. PA. J. INT'L L. 739, 777, 806, 845 (2001).

71. *US–Shrimp*, *supra* note 64. PAUWELYN ET AL., *supra* note 29, at 394.

72. PAUWELYN ET AL., *supra* note 29, at 395.

73. *Id.* at 396.

74. *Id.*

75. *US–Shrimp*, *supra* note 64, at ¶ 184.

reasoned that measures conditioning market access on adoption of a particular regulatory program, lack of negotiating agreements in good faith, and inequitable phase-in periods for different countries were indicative of unjustifiable discrimination, while a measure's rigidity, inflexibility, and lack of adequate due process constituted arbitrary discrimination.[76] Thus, the AB held that the United States regulations qualified as valid Article XX(g) exceptions when the United States later engaged in good faith treaty negotiations with other shrimp harvesting countries, amended their guidelines on shrimp harvesting to be more flexible, and allowed the importation of shrimp from countries with regulatory programs, which were comparable in effectiveness.[77]

Because WTO panels and the AB have continued to interpret the "chapeau" restrictively, domestic regulations predicated on Article XX defenses must be careful not to impose extra-jurisdictional implementation or apply differently between countries, and it must be flexible and allow for a transparent decision-making process, as well as not simply being a disguised restriction on international trade.

### C. A Power Shift

Coinciding with the formation of the WTO was a shift in power from developed countries to the emerging developing world.[78] Brazil and India led this power shift, which gained even more momentum following China's accession to the WTO in 2001.[79] Thus, the Doha Round, the current round of WTO trade negotiations, has become "a clash between the old powers—the US and EU—and the new— Brazil, India, and China."[80]

Whereas developing countries were forced into accepting many of the trade agreements in the Uruguay Round, the ascendance of China, India, and Brazil has been profound.[81] These three countries now drive the Doha Round's agenda, and it is likely that no trade deal can be secured at

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76. *See id.* at ¶¶ 181–84.

77. *See* Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products, – Recourse to Article 21.5 of the DSU by Malaysia*, ¶ 152–53, WTO Doc. WT/DS58/AB/RW (adopted Nov. 21, 2001).

78. HOPEWELL, *supra* note 23, at 1.

79. *See id.* at 77, 80, 93.

80. *Id.* at 98.

81. *See id.* at 99–100.

the WTO without the assent of these countries.[82] Furthermore, these countries have become some of "the most active and frequent users of the WTO dispute settlement system."[83] As of 2016, Brazil, India, and China brought a combined total of twenty-eight trade disputes against the United States and nineteen against the European Union.[84]

This shift in power—the result of both the increased economic power of the developing world and a refusal to have trade terms mandated by the "global north"—has resulted in increased wariness of free trade by those in developed countries. Industries affected by an influx of relatively cheap competing products have blamed unfair competition from developing countries as the reason for their woes, and politicians have seized on these fears as that public opinion in favor of free trade has waned.[85]

Exacerbating concerns about this power shift has been China's Protocol of Accession.[86] From 2001, when China was admitted to the WTO, until 2007, the United States imports from China tripled, the United States' trade deficit ballooned from $84 billion to $274 billion in the same period.[87] Likewise, China's share of exports to the European Union nearly doubled, while in Latin America its share grew from 2.6% in 2000 to 12.5% by 2009.[88] As Harvard Law Professor Mark Wu has argued, the WTO is "struggling to adjust to a rising China."[89] As Wu maintains, WTO law is not suitable for the intricacies of an economy like China's, in which it is difficult to determine whether a corporate entity is an extension of the state.[90]

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82. *Id.* at 79.

83. *Id.* at 103.

84. *Id.*

85. *See* POLITICO & HARV. T.H. CHAN SCH. PUB. HEALTH, AMERICANS' VIEWS ON CURRENT TRADE AND HEALTH POLICIES 3 (2016), https://www.politico.com/f/?id=00000157-58ef-d502-ad5f-dbef0b4f0000 (85% of Republicans believe that free trade has lost more jobs than it has created).

86. Protocol on the Accession of the People's Republic of China, WTO Doc. WT/L/432 (Nov. 23, 2001).

87. HOPEWELL, *supra* note 23, at 133.

88. Rhys Jenkins & Alexandre de Freitas Barbosa, *Fear for Manufacturing? China and the Future of Industry in Brazil and Latin America*, 209 CHINA Q. 59, 65 (2012).

89. Mark Wu, *The "China, Inc." Challenge to Global Trade Governance*, 57 HARV. INT'L L.J. 261, 264 (2016).

90. *Id.* at 264–65.

The question of whether or not China is a true "market economy" has come to a head with the expiration of provisions of China's Accession Protocol mandating it to be treated as a non-market economy.[91] In particular, the amorphous character of major Chinese corporations and banks makes it difficult to determine whether other WTO Member States may retaliate against Chinese products subsidized by these institutions.[92] Likewise, WTO anti-dumping laws—which allow a country to impose additional duties when foreign producers unload products in an export market at a cheaper price than they sell products at domestically, and the "dumping" causes or threatens to cause injury to a domestic producer—will be harder to apply if China is automatically granted "market economy" status at the WTO.[93] The WTO has not yet ruled on whether or not China is a "market economy" now that the Accession Protocol has expired.[94] These issues have caused some commentators in the West to advocate for moving beyond the WTO in dealing with China.[95]

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91. *See* David Lawder, *U.S. Formally Opposes China Market Status at WTO*, REUTERS (Nov. 30, 2017), https://www.reuters.com/article/us-usa-china-trade-wto/u-s-formally-opposes-china-market-economy-status-at-wto-idUSKBN1DU2VH.

92. *See* Appellate Body Report, *United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, ¶ 611, WTO Doc. WT/DS379/AB/R (adopted Mar. 25, 2011) (holding that subsidies Chinese owned banks and state-owned enterprises were not per se actionable subsidies); Wu, *supra* note 89, at 301–05.

93. *See* GATT, *supra* note 22, art. VI.

94. *See* Douglas Bulloch, *China is Not a Market Economy, and the WTO Won't Survive Recognizing it as Such*, FORBES (Dec. 8, 2017, 4:01 AM), https://www.forbes.com/sites/douglasbulloch/2017/12/08/china-is-not-a-market-economy-and-the-wto-wont-survive-recognising-it-as-such/#e775c9937fc6 (arguing that if the WTO recognizes China as a market economy, it runs the risk of the US choosing to unilaterally exercise powers that "may undermine the centrality of the WTO to world trade").

95. *See* Clyde Prestowitz, *China's Not Breaking the Rules. It's Playing a Different Game*, FOREIGN POL'Y (Feb. 17, 2012, 4:24 PM), http://foreignpolicy.com/2012/02/17/chinas-not-breaking-the-rules-its-playing-a-different-game/; Wu, *supra* note 89, at 267.

## III. WHO ARE THE "WINNERS" AND "LOSERS" IN THE WTO?

President Trump likes to characterize groups as "winning" or "losing" international agreements.[96] As noted above, economists have traditionally assumed that trade liberalization would be beneficial to all parties involved, creating a system that would produce only "winners" in the long run.[97] However, President Trump is not alone in viewing the United States as "losing" from its commitments in both the WTO and other FTAs.[98] Harvard economist Dani Rodrik has long asserted that free trade would result in an uneven distribution of gains and, in some cases, actual declines in standard of living for certain segments of society.[99] Others, like Larry Summers, the former chief economist of the World Bank, and Nobel Prize-winning economist Paul Krugman have retreated from their beliefs that free trade is beneficial to everyone.[100] If President Trump and these economists are correct that free trade creates both "winners" and "losers," who exactly has gained the most from the liberalization of trade?

### A. The Elephant in the Room

If, as most economists have posited, free trade is beneficial to all countries, and by extension, their citizens, we should see a general increase in real income in all countries and socio-economic strata. However, recent studies have shown this is not so. Branko Milanovic's famous "Elephant Chart" shows that while real income has increased rapidly for much of the world since 1988, trade liberalization has not benefitted certain segments of the world's population.[101]

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96. *Read Donald Trump's Speech on Trade*, TIME (June 28, 2016, 4:55 PM), https://time.com/4386335/donald-trump-trade-speech-transcript/ (stating that in discussing increasing tariffs, President Trump said, "You already have a trade war, and we're losing badly").

97. PAUWELYN ET AL., *supra* note 29, at 44.

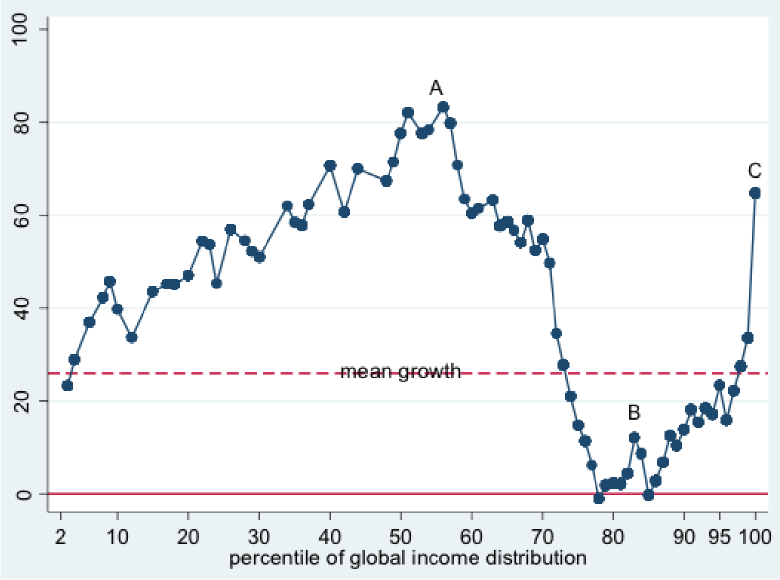
98. *Read Donald Trump's Speech on Trade*, *supra* note 96.

99. *See, e.g.*, RODRIK, THE GLOBALIZATION PARADOX, *supra* note 11, at 56.

100. *See* Saval, *supra* note 20.

101. Milanovic, *supra* note 11, at 12–15.

Figure 5 Cumulative Real Income Growth Between 1988 and 2008 [102]




As Figure 5 shows, while much of the world has experienced unprecedented growth in real income, those situated between the 75th and 90th percentiles of global income distribution have experienced relatively stagnant growth, and, in some cases, an actual decline.[103] This group, represented by Point B in Figure 5, is mainly comprised of citizens of developed countries. Seven out of ten people at that point are from Organisation for Economic Co-operation and Development ("OECD") countries.[104] These people belong to the lower half of their countries' income distributions, since many rich countries' income distributions begin around the 70th percentile of global income distribution—and in the case of especially rich countries, at the 80th percentile.[105]

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102. This graph's y-axis shows the percentage growth in real income between years 1988 and 2008. Branko Milanovic, *The Greatest Reshuffle of Individual Incomes Since the Industrial Revolution*, fig. 1, VOX EU (July 1, 2016), http://voxeu.org/article/greatest-reshuffle-individual-incomes-industrial-revolution.

103. Milanovic, *supra* note 11, at 13.

104. Milanovic, *supra* note 102.

105. *Id.*

Contrast the stagnation in the top quarter of global income distribution with the growth at Point A, where growth in real income has been between 70% and 80%.[106] Between the 50th and 60th percentile of the global income distribution sits the middle class of the emerging market economies—citizens of China, India, Brazil, Indonesia, and Egypt.[107] Similarly, "those at the bottom third of the global income distribution have also [seen] significant gains, with real incomes rising" between 40% and 70%.[108]

Looking at this disparity from an egalitarian point of view, one might welcome greater real income growth for the citizens of traditionally poor countries. Indeed, one's country of birth is the greatest indicator of one's real income;[109] faster growth at the lower-half of the income distribution should lessen income inequality between citizens in developed countries and developing countries.

However, the massive increase in real income of the top global 1%, and to a lesser extent, the top 5% has overshadowed whatever decrease in inequality that has been achieved between points A and B on the "Elephant Chart."[110] Between 1988 and 2008, the top 1% saw its real income increase by more than 60%.[111]

### B. The Winners

As the "Elephant Chart" suggests, the winners of increased globalization and trade liberalization have been the top global 5% and the middle class of emerging market economies, China and India in particular. While traditional trade theory explains why gains in real income have been achieved in concert with trade liberalization, there has

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106. Milanovic, *supra* note 11, at 12.

107. *Id.* ("[B]etween the 50th and 60th percentile of the global income distribution [are] 200 million Chinese, 90 million Indians, and about 30 million people each from Indonesia, Brazil and Egypt.").

108. *Id.*

109. *See* Branko Milanovic, *Global Inequality: From Class to Location, from Proletarians to Migrants* 7 (World Bank Dev. Research Grp., Working Paper No. 5820, 2011) ("[Economic Inequality] has become preponderantly an inequality determined by location only.").

110. *See* Milanovic, *supra* note 11, at 14. These percentages refer to the wealthiest 1% and 5% of the world's population. *Id.*

111. *Id.* at 12.

been little focus on the conditions that have allowed such disparate groups to flourish while other groups stagnated.

It is not mere coincidence that the populations that benefit most from globalization are the world's richest and those in rapidly developing countries. The supply of cheap labor in developing countries has given corporations incentives to outsource both labor and service jobs. The result is beneficial to both, as developing countries are provided with relatively higher-paying jobs, while corporations are provided with a cheaper source of labor.

### 1. *The Current Rules of Free Trade Benefit the World's Richest*

The Global 1% consists of about sixty million people, over half of which are Americans.[112] In addition to the richest 12% of Americans, the Global 1% is composed of the richest 3-6% of Britons, Japanese, Germans, and French.[113] While the richest 1% of other European countries, Brazil, Russia, and South Africa, and the very wealthy in developing countries, are included in the top percentile, it is still very much a "club" composed of the "old rich" world—western Europe, northern America, and Japan.[114]

> In 2008, the threshold for being in the global top 1% was [$]45,000 . . . per person per year which, translated into a traditional family structure of two partners and two children, implies an after-tax income of $180,000 (or, using the approximate tax rates of rich countries, a before-tax income of more than $300,000).[115]

In other words, the world's richest people are not among those suffering from the distributional effects of globalization.[116] The United

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112. *Id.* at 14.
113. *Id.*
114. *Id.*
115. Milanovic, *supra* note 102.
116. OECD, DIVIDED WE STAND: WHY INEQUALITY KEEPS RISING 28–29 (2011), https://www.oecd-ilibrary.org/social-issues-migration-health/the-causes-of-growing-inequalities-in-oecd-countries_9789264119536-en (observing that global integration and technological progress have brought highly skilled workers greater rewards than low-skilled workers); *see also* Holger Görg, *Globalization, Offshoring and Jobs*, *in* MAKING

States and other developed countries have lowered tariffs and other protections on commercial services, such as banking, finance, transportation, telecommunications, consulting, advertising, entertainment, health care, construction, and utilities.[117] Since developed countries tend to have a comparative advantage in these fields, outsourcing is less of a risk, and thus, the rich and upper-middle class in developed countries have been among the prime beneficiaries of globalization.[118]

But corporate interests have been, and remain, the biggest beneficiary of globalization and liberalized trade.[119] Multinational corporations ("MNCs") have "no sentimental ties to family, community, or even to any given [country], because they are not real people and their stockholders may be located anywhere on the globe."[120] Profit, not people, is the driver behind these companies. Reducing trade barriers allows corporations to both outsource labor when domestic labor becomes too expensive and import source materials and intermediate goods from countries that produce them at a comparative advantage.[121] As this Article discusses below, while the theory of comparative advantage posits that this movement in production should be beneficial to all, these benefits have mainly fell into the hands of powerful corporate interests and the world's richest citizens. Foreign Direct Investment ("FDI") in undeveloped and developing countries stunts the

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GLOBALIZATION SOCIALLY SUSTAINABLE 21, 31–37 (Marc Bacchetta & Marion Jansen eds., 2011), https://www.wto.org/english/res_e/booksp_e/glob_soc_sus_e.pdf (pointing to studies that show services offshoring has mild negative effects on employment of workers in low-skilled occupations, but positive effects on high-skilled occupations).

117. *See* HOPEWELL, *supra* note 23, at 57.

118. HOPEWELL, *supra* note 23, at 57.

119. *See The Threat of Globalization*, GLOBAL POL'Y F., https://www.globalpolicy.org/globalization/defining-globalization/47948-the-threat-of-globalization.html (last visited Apr. 20, 2020).

120. John Ikerd, *The Cost and Benefit of Globalization: Who Are the Beneficiaries?*, COUNCIL ON AFR. SEC. & DEV. (Jan. 4, 2020), http://www.casade.org/the-cost-and-benefit-of-globalization-who-are-the-beneficiaries/.

121. *See* U.N. Conference on Trade and Development, *Global Supply Chains: Trade and Economic Policies for Developing Countries*, U.N. Doc. UNCTAD/ITCD/TAB/56 4, 7 (2013), http://unctad.org/en/PublicationsLibrary/itcdtab56_en.pdf (showing global trade in intermediate goods has rapidly expanded since the birth of the WTO).

growth of domestic firms.[122] MNCs, while providing jobs, pocket a majority of profits.[123] Foreign investors take out these profits and return them to the multinational's home country—often a developed country[124]—and thus developing states are left worse off than if domestic corporations or the state owned the means of production.[125] MNCs are also often given favorable treatment: "tax holidays, exemptions from import duties, the provision of land for facilities, and the offer of direct subsidies."[126]

### 2. *China and India's Middle Classes Are Winning, but for How Long?*

The second group of beneficiaries of global trade has been the middle class in developing countries, particularly in China and India. Since 1960, the share of global GDP produced by developed countries has dropped from 80% to 44%.[127] Three developing countries, China, India,

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122. *See* Ari Kokko & Tran Toan Thang, *Foreign Direct Investment and the Survival of Domestic Private Firms in Viet Nam*, 31 ASIAN DEV. REV. 53, 82–84 (2014) (finding that increased FDI makes domestic firms more vulnerable in Vietnam); Heiwei Tang, Spillovers from Foreign Direct Investment in China: The Role of Ownership 27 (Apr. 13, 2008) (unpublished manuscript), http://www.hwtang.com/uploads/3/0/7/2/3072318/paper2final_hwtang.pdf (finding that FDI is associated with lower domestic productivity in the same sector in China).

123. *See* Duncan Green, *$2 Leaving Developing Countries for Every $1 Going in – Big New Report on the State of Global Financial Flows*, OXFAM BLOG (Dec. 18, 2014), https://oxfamblogs.org/fp2p/twice-as-much-leaving-poor-countries-as-is-going-in-big-new-report-on-the-state-of-global-financial-flows/ (analyzing that for every 44 cents of FDI invested in a country, 42 cents in profit is taken out by financial investors).

124. Three-hundred-sixteen of the Global 500 companies come from nine "rich" countries. *Global 500 2017*, FORTUNE, https://fortune.com/global500/2017/ (last visited Apr. 20, 2020).

125. *See* Dirk H. M. Akkermans, *Net Profit Flow Per Country from 1980 to 2009: The Long-Term Effects of Foreign Direct Investment*, PLOS ONE, June 27, 2017, at 2–3, http://journals.plos.org/plosone/article?id=10.1371/journal.pone.0179244 (stating that FDI benefits "core" countries, or developed countries, at the long-term expense of developing countries, and FDI has only benefitted owners of capital in the "core" countries, not workers); Tang, *supra* note 122, at 1–2. (finding that FDI is associated with lower domestic productivity in the same sector in China).

126. Rui Moura & Rosa Forte, The Effects of Foreign Direct Investment on the Host Country Economic Growth - Theory and Empirical Evidence 1 (July 2009) (unpublished manuscript), http://www.etsg.org/ETSG2009/papers/forte.pdf.

127. HOPEWELL, *supra* note 23, at 1.

and Brazil, now account for 25% of the global economy, nearly matching the entire production of G7 economies, which make up 33% of the global economy.[128]

As mentioned above, the middle class in these countries has seen their real incomes increase by the largest percentage since 1988—between 70% and 80%.[129] While this remarkable growth is due to a number of factors,[130] the opening of their markets to international trade has played a vital role in increasing real incomes and raising standards of living.[131]

This is, of course, the biggest success story of globalization. Both proponents and detractors of economic globalization agree that raising people out of poverty is one of the most important political issues.[132] However, as this Article discusses below, while globalization may have contributed to escaping an arbitrarily defined poverty, living conditions for many in these countries still remain far below those of citizens in developed countries.[133] Thus, while outsourcing may lead to an increasing number of jobs for people in developing countries, as well as increased wages, it does not necessarily mean that their standard of living has improved by a meaningful degree.[134] As wages increase in quickly developing countries such as China, there are even fears that corporations will begin outsourcing to poorer countries where wages have not yet risen.[135]

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128. *Id.*

129. *See* Milanovic, *supra* note 11, at 12.

130. State investment has also been a primary factor in the economic growth of these countries. *See* John Ross, *Why Are China and India Growing So Fast? State Investment*, HUFFPOST (Dec. 6, 2017), https://www.huffpost.com/entry/china-india-growth_b_11655472.

131. *See* HOPEWELL, *supra* note 23, at 127–33, 149–55.

132. *See* WORLD BANK GRP. & WTO, THE ROLE OF TRADE IN ENDING POVERTY 7 (2015), https://www.wto.org/english/res_e/booksp_e/worldbankandwto15_e.pdf; *Workers' Rights*, OXFAM AUSTL., https://www.oxfam.org.au/whats-wrong-with-world-trade/ (last visited Apr. 20, 2020).

133. *Infra* Part III.C.1.

134. *See Workers' Rights*, *supra* note 132.

135. Sophia Yan, *'Made in China' Isn't So Cheap Anymore, and That Could Spell Headache for Beijing*, CNBC (Feb. 27, 2017, 12:37 AM), https://www.cnbc.com/2017/02/27/chinese-wages-rise-made-in-china-isnt-so-cheap-anymore.html (observing that average hourly wages in China have spiked 64% since 2011, translating to higher manufacturing costs for companies, but there is fear that these jobs could be outsourced to countries like India or Sri Lanka where wages are more than five times lower).

## C. The Losers

The “losers” of free trade fall into two diverse camps, united perhaps by their lack of political clout on both a global and national scale. The first of these groups, the “absolute poor,” or poorest 5% of the world’s population,[136] are undoubtedly the biggest losers in the current trade regime. During the same period in which the median global real income rose 80%, the real incomes of the poorest 5% remained the same.[137] The second group are the constituents of the “global upper-middle class,” those whose real income falls between the 75th and 90th percentiles of the global income distribution.[138] This segment of the world population includes many from former Communist countries, Latin America, and citizens of developed countries whose incomes stagnated.[139] Increased international trade is at the root of these stagnating incomes.[140]

### 1. *The “Absolute Poor”*

Proponents of free trade often point to statistics that shows as tariffs and trade barriers have fallen, the rate of world poverty has decreased.[141] While this is true—the World Bank estimates that nearly 1.1 billion people have moved out of poverty since 1990—the decrease in poverty was mainly realized in a handful of countries, primarily by those living in urban areas.[142] Furthermore, the World Bank’s definition of poverty—

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136. *See* Milanovic, *supra* note 11, at 12.

137. *Id.*

138. *Id.* at 13.

139. *Id.*

140. For a detailed account of how increased trade between developed countries and developing countries, see JOSH BIVENS, USING STANDARD MODELS TO BENCHMARK THE COSTS OF GLOBALIZATION FOR AMERICAN WORKERS WITHOUT A COLLEGE DEGREE (2013), https://www.epi.org/files/2013/standard-models-benchmark-costs-globalization.pdf.

141. *See e.g.*, WORLD BANK GRP. & WTO, *supra* note 132, at 7; IMF ET AL., MAKING TRADE AND ENGINE OF GROWTH FOR ALL: THE CASE FOR TRADE AND FOR POLICIES TO FACILITATE ADJUSTMENT 8 (2017); Tim Worstall, Opinion, *If You’re Anti-Poverty You Should be Pro- Free Trade and Globalization*, FORBES (Oct. 1, 2015, 7:06 AM), https://www.forbes.com/sites/timworstall/2015/10/01/if-youre-anti-poverty-you-should-be-pro-free-trade-and-globalisation/#1b61f6d51d62.

142. *See* Nina Pavcnik, Dossier: Is Protectionism the Solution? *Benefits and Costs of Free Trade for Less Developed Countries*, BOOKS & IDEAS (Nov. 5, 2009),

those people living on less than $1.90 per day—does not fully inform one of the economic conditions that many living in third world countries face.[143] Even someone making ten times that amount would still qualify as impoverished in developed countries.[144] One way to see this is by comparing the United States second income decile with the Chinese urban eighth income decile.[145] While the real income of the United States second decile has increased by about 20% since 1988, China's urban eighth decile has increased by a factor of 6.5.[146] Despite this, Americans at the second income decile still have a higher real income.[147] Thus, while the trend in economic globalization may have lifted some above an arbitrary poverty line, it has not necessarily improved their standard of living in any appreciable way.[148]

Stated differently, even people living in countries that have experienced noticeable economic improvement over the last few decades, particularly those 1.1 billion people who have moved out of poverty, have only minimally improved their standard of living. One study found only two countries where the "average beneficiary jumped

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http://www.booksandideas.net/Benefits-and-costs-of-free-trade.html#nb3 ("[P]overty rates declined by less in rural India in areas where employment was concentrated in industries that lost protection than in areas less exposed to the loss of protection. Workers in previously protected industries observed declines in their wages relative to individuals in areas better positioned to take advantage of trade liberalization."); *Poverty*, WORLD BANK, http://www.worldbank.org/en/topic/poverty/overview (last updated Apr. 16, 2020) (providing that according to the most recent estimates, in 2015, 10% of the world's population lived on less than $1.90 a day, down from 36% in 1990).

143. *See Poverty*, *supra* note 142.

144. *See Poverty Guidelines*, U.S. DEP'T HEALTH & HUM. SERVS., https://aspe.hhs.gov/poverty-guidelines (last updated Jan. 8, 2020). The poverty line in the United States as of 2020 is $12,760 per year for a single person, or roughly $35 per day. *Id.*

145. Branko Milanovic, *Winners of Globalization: The Rich and the Chinese Middle Class. Losers: The American Middle Class*, 31 NEW PERSP. Q. 78, 80 (2014).

146. *Id.* at 80–81.

147. *Id.* at 80.

148. *See* Raju Jan Singh, *Evidence that Trade Does Reduce Poverty, but Only if the Conditions Are Right*, WORLD BANK (Feb. 19, 2013), http://blogs.worldbank.org/trade/evidence-that-trade-does-reduce-poverty-but-only-if-the-conditions-are-right. As even World Bank economists have noted, trade only tends to reduce poverty in specific settings: "in countries where financial sectors are deep, education levels high, and governance strong." *Id.*

from less than $1.88 to more than $2.13: Pakistan and Thailand."[149] The average beneficiary in every other country made only minor jumps within that range.[150]

Proponents of free trade also make the mistake of pointing to states with an abundance of protectionist policies as beacons of free trade. South Korea and Taiwan are viewed as shining examples of the benefits of trade liberalization when, in fact, these states became international trading powers using "government subsidies and heavy investment in infrastructure and skills development while being protected from competition by overseas firms."[151] Unsurprisingly, in recent years, countries that have reduced levels of poverty by increasing economic growth—China, Vietnam, India, and Mozambique—have "all had high levels of intervention as part of an overall policy of strengthening domestic sectors."[152]

Meanwhile, many other developing countries have not been able to capitalize by liberalizing trade because they do not have the infrastructure to compete with highly efficient producers such as China.[153] In Zambia and Ghana, the opening up of markets led to sudden falls in growth rates as domestic industry was unable to compete with foreign goods.[154] Even in countries that have experienced economic growth from liberalizing their markets, poverty has not necessarily decreased.[155] After Mexico joined NAFTA, it experienced economic growth, "yet the number of people living below the poverty line increased by 14 million in the 10 years from the mid-1980s."[156] This

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149. Ian Fletcher & Jeff Ferry, *Free Trade Isn't Helping World Poverty*, HUFFPOST (May 25, 2011), https://www.huffpost.com/entry/free-trade-isnt-helping-w_b_837893.

150. *See id.*

151. Stephen Byers, *I Was Wrong. Free Market Trade Policies Hurt the Poor*, GUARDIAN (May 19, 2003, 11:19 AM), https://www.theguardian.com/politics/2003/may/19/globalisation.politics.

152. *Id.*

153. *See* Adrian Wood & Jörg Mayer, *Has China De-Industrialized Other Developing Nations?*, VOX EU (July 28, 2009), http://voxeu.org/article/has-china-de-industrialised-other-developing-countries (postulating the possibility that China's ascendency as an industrial power has actually de-industrialized other developing countries).

154. Byers, *supra* note 151.

155. *Id.*

156. *Id.*

occurred because the gains of liberalized trade went primarily to large commercial operators.[157]

### 2. *The "Global Upper-Middle Class"*

Just as the poorest of the world's population have been excluded from the fruits of increased global trade, so too have the poorest citizens in developed countries. Predictably, these people are often those who had been employed in industries that moved their operations to developing countries, such as those in manufacturing.[158] The decreased labor demand in developed countries led to falling wages and income stagnation.[159]

The middle and working classes have primarily borne the brunt of this income stagnation.[160] In the United States, real household income for those in the 4th quintile declined by 2.2% from 2000 to 2017, while

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157. *Id.*

158. *See* Greg Jericho, *Free Trade Is Viewed as Economic Catnip, but the Benefits Are Not for Everyone*, GUARDIAN (July 10, 2016, 8:53 PM), https://www.theguardian.com/business/grogonomics/2016/jul/11/there-are-economic-benefits-to-free-trade-but-not-for-everyone. *See also* Matthew C Klein, *How Many US Manufacturing Jobs Were Lost to Globalisation*?, FIN. TIMES (Dec. 6, 2016, 6:05 AM), https://ftalphaville.ft.com/2016/12/06/2180771/how-many-us-manufacturing-jobs-were-lost-to-globalisation/ ("[A]lmost half of the total decline in manufacturing employment—more than 2 million reasonably well-paying American jobs—might be explained by imports displacing domestic production."); Katherine Peralta, *Outsourcing to China Cost U.S. 3.2 Million Jobs Since 2001*, US NEWS & WORLD REP. (Dec. 11, 2014, 4:57 PM), https://www.usnews.com/news/blogs/data-mine/2014/12/11/outsourcing-to-china-cost-us-32-million-jobs-since-2001 (explaining that from 2001 to 2011, the United States workers who were directly displaced by trade with China lost a collective $37 billion in wages as a result of accepting other lower paying jobs, and of the jobs lost to outsourcing to China, over two-thirds were in manufacturing).

159. *See* Jay Shambaugh & Ryan Nunn, *Why Wages Aren't Growing in America*, HARV. BUS. REV. (Oct. 24, 2017), https://hbr.org/2017/10/why-wages-arent-growing-in-america (arguing that adequate labor demand help to combat income stagnation).

160. *See* ELISE GOULD, WHY AMERICA'S WORKERS NEED FASTER WAGE GROWTH—AND WHAT WE CAN DO ABOUT IT 4 (2014), https://www.epi.org/files/2014/why-americas-workers-need-faster-wage-growth-final.pdf (finding that the real hourly wage of American workers at the 50th wage percentile has increased by only 6.1% since 1980, and real hourly wages have decreased by 5.3% for workers at the 10th percentile) (comparing this with an increase of 40.6% for those in the 95th wage percentile).

income for the bottom quintile decreased by 9.4%.[161] Further, since 2007, the real hourly wages of 70% of Americans fell.[162] One study found that from 2005 and 2014, between 65% and 70% of people in the twenty-five richest western countries saw their incomes stagnate.[163] These numbers range from a stagnation level as high as 97% of Italian households to a low of 20% in Sweden.[164] In Australia, "while GDP per capita has grown by [nearly 10%], real net national disposable income per capita has fallen by about [2%]" since 2008, showing that real incomes have stagnated, if not declined.[165] Since the mid-1980s in OECD countries, the average income of the richest 10% of the population has grown to nine times that of the poorest 10%, as incomes for top earners have grown 46% faster than that of the lowest earners.[166]

While multiple factors have contributed to declining and stagnating wages, "international trade has been a clear factor suppressing wages in the middle of the [United States'] wage structure . . . particularly since 1995."[167] While trade agreements provide protections for corporate interests, they "generally provide[] no protection against a race to the bottom on labor standards."[168] "Falling prices for import-competing production will (all else equal) reduce the wages paid to workers . . . in import-competing sectors," as well as those "who resemble the workers in import-competing sectors in important aspects such as education and work experience."[169] A study by McKinsey & Company found that

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161. Jill Mislinski, *U.S. Household Incomes: A 50+ Year Perspective*, ADVISOR PERSP. (Sept. 19, 2017), https://www.advisorperspectives.com/dshort/updates/2017/09/19/u-s-household-incomes-a-50-year-perspective.pdf.

162. GOULD, *supra* note 160, at 16–17.

163. Larry Elliott, *Up to 70% of People in Developed Countries 'Have Seen Incomes Stagnate,'* GUARDIAN (July 13, 2016, 7:01 PM), https://www.theguardian.com/business/2016/jul/14/up-to-70-per-cent-people-developed-countries-seen-income-stagnate.

164. *Id.*

165. Greg Jericho, *Economic Theory Can't Match Lived Experience*, ABC NEWS (July 7, 2016, 4:26 PM), http://www.abc.net.au/news/2016-07-06/jericho-economic-theory-cant-match-lived-experience/7572508.

166. *See* OECD, *supra* note 116, at 22–23.

167. JOSH BIVENS ET AL., RAISING AMERICA'S PAY: WHY IT'S OUR CENTRAL ECONOMIC POLICY CHALLENGE 58 (2014), http://www.epi.org/files/pdf/65287.pdf.

168. *Id.* at 65.

169. *Id.* at 70

between 1980 and 2010, eighty-five million workers in emerging economies joined the low-and-medium skill labor force in export-related activities.[170] Thus, it is little surprise that increased international trade "affects wages through its influence on [the relative] bargaining power of different groups of workers."[171] The threat of relocating jobs to other countries has shifted bargaining power to corporate interests and weakened unions.[172]

### D. The Problem

While trade liberalization creates additional wealth—as evidenced by the over 20% mean growth in real income between 1988 and 2008[173]—the "absolute poor" and the "global upper-middle class," have seen little or none of the benefits of globalization.[174] These distributional effects are at odds with traditional theories of trade, which theorize that liberalized trade should have net beneficial effects on all actors.[175] The problem, therefore, is continuing to capture the economic gains of globalization, while balancing two oft-competing goals: (1) ensuring that all world citizens have access to these gains, and (2) a country's duty to maximize its own citizens' prosperity.[176]

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170. MCKINSEY GLOB. INST., POORER THAN THEIR PARENTS? FLAT OR FALLING INCOMES IN ADVANCED ECONOMIES 11 (2016).

171. BIVENS ET AL., *supra* note 167, at 70.

172. *See* Noel Gaston, *The Effects of Globalisation on Unions and the Nature of Collective Bargaining*, 17 J. ECON. INTEGRATION 377, 386 (2002) ("The ability to outsource shifts the domestic collective bargaining outcome in favour of the firm."); Katy Waldman, *Don't Mourn. Organize!*, SLATE (Oct. 9, 2012, 2:02 PM), http://www.slate.com/articles/briefing/the_hive/2012/10/united_auto_workers_can_manufacturing_unions_survive_outsourcing_and_right_to_work_laws_.html ("[R]ight-to-work laws, outsourcing, and anti-union sentiment have massively weakened America's unions, such that unionized workers made up only 11.8 percent of the workforce in 2011.").

173. Milanovic, *supra* note 102.

174. *See supra* Part III.C.

175. *See* David H. Autor et al., *The China Shock: Learning from Labor Market Adjustment to Large Changes in Trade* 1, 12 (Nat'l Bureau Eco. Research, Working Paper No. 21906, 2016), http://www.nber.org/papers/w21906.pdf ("[I]t is standard to assume that trade is balanced and to analyze the impact of trade shocks on the long-run global equilibrium.").

176. *See* Lawrence Summers, Opinion, *How to Embrace Nationalism Responsibly*, WASH. POST (July 10, 2016), https://www.washingtonpost.com/opinions/global-

Traditional theories of trade have tended to neglect the effects of trade on employment levels.[177] These traditional models, such as the Heckscher-Ohlin model, rely on the assumption that perfectly competitive labor markets exist.[178]

However, in the real world, there can be no reliance on a perfectly competitive labor market or an assumption of full employment. With this in mind, imagine a trade regime, in which two countries, A and B, have the infrastructure to manufacture shoes. Each country has 100 workers capable of making shoes. However, Country A, a developed country, has a minimum wage of $10 per hour, while Country B, a developing country, can pay its workers $2 an hour to make shoes of equal quality at the same pace as workers in Country A. Each worker can make two pairs of shoes for every hour worked and a pair of shoes sells for $50.

In each country, a shoe manufacturer will be able to produce 200 pairs of shoes each hour, which at $50 per pair would generate sales of $10,000. However, while Country B is able to produce the 200 shoes for a mere $200, in Country A, the labor costs rise to $1,000. The shoe manufacturer will be able to save $800 in labor costs per hour.

*Figure 6*. Labor Costs and Net Profit in Country A and Country B Per Hour

| | Gross Product | Labor Costs | Net Profit |
|---|---|---|---|
| Country A | $10,000 | $1,000 | $9,000 |
| Country B | $10,000 | $200 | $9,800 |

Under such circumstances, it would be more efficient for the manufacturer to open the shoe factory in Country B—he saves $800 each hour. Country B is more efficient, and according to the theory of comparative advantage, Country A should focus on producing another product.

Unfortunately for the workers in Country A, there is not always an alternative to work at the shoe factory. If the only products that Country A can produce at a comparative advantage are those that require highly skilled labor, these workers may not have the opportunity to rejoin the labor market. Thus, if the shoe factory in Country A were forced to close

opinions/how-to-embrace-nationalism-responsibly/2016/07/10/faf7a100-4507-11e6-8856-f26de2537a9d_story.html?utm_term=.7ff4c10cfc5a.

177. Görg, *supra* note 116, at 22–23.

178. *Id.*

because it would no longer be competitive with shoe factories in Country B, the employees in those factories would have to search for a new job. Many of these employees likely have a limited skillset, so if there is no latent demand for unskilled labor in the area, these employees will either join the ranks of the unemployed or be forced to move, something that many people cannot do, whether for personal or financial reasons.[179]

Coinciding with the globalization trend has been an era of rapid technological change and innovation. Technical change puts pressure on the wages of unskilled laborers where it is more efficient to have machines do work than humans. Consider how McDonald's responded to strikes by workers demanding higher wages. Instead of caving to labor's demands, McDonald's threatened to install touchscreen kiosks that, while requiring greater capital output in the short-term, would be cheaper long-term.[180] In the past, such technological change often led to what economists call a J-curve: as new technology increases productivity, it leads to higher wages as jobs in new sectors are created by this increased productivity.[181] However, this displacement of unskilled labor by technology-based change is now continuous.[182] Before unskilled workers get to the upswing on the J-curve, they are met with more technological change and thus move from the declining segment of one J-curve to the next.[183]

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179. *See e.g.*, Alana Semuels, *The Barriers Stopping Poor People from Moving to Better Jobs*, ATLANTIC (Oct. 12, 2017), https://www.theatlantic.com/business/archive/2017/10/geographic-mobility-and-housing/542439/.

180. *See* Ed Rensi, Opinion, *Thanks to 'Fight for $15' Minimum Wage, McDonald's Unveils Job-Replacing Self-Service Kiosks Nationwide,* FORBES (Nov. 29, 2016, 1:37 PM), https://www.forbes.com/sites/realspin/2016/11/29/thanks-to-fight-for-15-minimum-wage-mcdonalds-unveils-job-replacing-self-service-kiosks-nationwide/#95127b84fbc6.

181. *See* Katie Allen, *Technology Has Created More Jobs Than It Has Destroyed, Says 140 Years of Data*, GUARDIAN (Aug. 18, 2015, 2:00 PM), https://www.theguardian.com/business/2015/aug/17/technology-created-more-jobs-than-destroyed-140-years-data-census.

182. *See* David Rotman, *How Technology Is Destroying Jobs*, MIT TECH. REV. (June 12, 2013), https://www.technologyreview.com/s/515926/how-technology-is-destroying-jobs/.

183. Jagdish Bhagwati, Opinion, *Technology, Not Globalisation, Drives Wages Down*, FIN. TIMES (Jan. 3, 2007), https://www.ft.com/content/f8738fba-9b53-11db-aa70-0000779e2340.

While older economic models tended to assume that any such lags in labor mobility were temporary, recent scholarship has found this may not be the case, especially in the context of the unparalleled growth of the Chinese economy.[184] In a study measuring increases in imports between the years of 1991 and 2007, David Autor and others found "the U.S. and the other high income countries experienced rising imports in almost all of the 397 harmonized four-digit manufacturing industries, and the pattern of import growth across industries is highly correlated between the U.S. and the other countries."[185] China's considerable gains in market penetration across numerous countries in the same time period suggests that "China's falling prices, rising quality, and diminishing trade and tariff costs in these surging sectors are a root cause."[186] Accordingly, due to China's increased share of manufacturing imports in developed countries, Chinese import competition had a negative impact on manufacturing employment.[187]

While the effects of outsourcing in services has less of a negative impact in developed countries than the outsourcing of manufacturing jobs, a similar pattern could emerge where trade in services to be further liberalized, especially in English-speaking countries. India has a competitive advantage in services thanks to a large pool of skilled, English-speaking workers who are available at wages far lower than in the developed world.[188] For example, the estimated salary range for Indian software developers in 2010 was about $5,300 to $9,700, compared with $53,000 to $80,000 in the United States.[189] And again, while India's impressive economic growth in the service industry may seem like a win for globalization and trade liberalization, growth has mainly benefitted the affluent upper class with "very little if any trickling down to the rural poor" who accounts for nearly two-thirds of India's 1.2 billion people.[190] Further, as China's economy matures, it will likely

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184. *See* Autor et al., *supra* note 175, at 15.

185. *Id*. at 17.

186. *Id.*

187. *Id.* at 26–27 (stating that negative labor market effects from exposure to trade with China have been observed in the United States, Norway, Spain and Germany).

188. HOPEWELL, *supra* note 23, at 151.

189. *Id.*

190. *Id.* at 155 (quoting Tom Wright & Harsh Gupta, *India's Boom Bypasses Rural Poor*, WALL ST. J. (Apr. 29, 2011), https://www.wsj.com/articles/SB10001424052748704081604576143671902043578).

move from a manufacturing based economy to a service based economy.[191] A fully developed Chinese service economy would thus have the potential to destabilize service sectors in developed countries, in the same way that China's manufacturing growth has undermined the manufacturing sectors in both developed[192] and developing countries.[193]

Countries must address the inequitable redistribution fueled by globalization. "Rising income inequality creates [serious] economic, social[,] and political challenges," and "can stifle upward social mobility."[194] The way the system currently works is Robin Hood-esque—if Robin stole from the poor and gave to the rich. "People will no longer support [free] trade if they feel they are losing out while a small group of winners" and the citizens of foreign countries become richer.[195] And, as elections of the past few years have revealed, people are beginning to notice. From the election of an "America First" president in the United States,[196] to anti-European sentiment in the United Kingdom,[197] to anti-

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191. Mark Magnier, *As Growth Slows, China Highlights Transition from Manufacturing to Service*, WALL ST. J. (Jan. 19, 2016, 1:23 PM), https://www.wsj.com/articles/as-growth-slows-china-highlights-transition-from-manufacturing-to-service-1453221751 (stating that China's service industry grew by 8.3% and 7.8% in 2015 and 2014, respectively).

192. *See* Daron Acemoğlu et al., *The Rise of China and the Future of US Manufacturing*, VOX EU (Sept. 28, 2014), https://voxeu.org/article/rise-china-and-future-us-manufacturing (theorizing that manufacturing jobs lost to China are unlikely to return); William Louch, *Chinese Market Economy Status Could Put 3.5 Million EU Jobs at Risk*, PARLIAMENT MAG. (Sept. 21, 2015), https://www.theparliamentmagazine.eu/articles/news/chinese-market-economy-status-could-put-35-million-eu-jobs-risk (stating that if China is granted market economy status by WTO, it could put 1.7 to 3.5 million jobs in the EU at risk); *All Employees: Manufacturing*, FED. RES. BANK ST. LOUIS (Nov. 1, 2019), https://fred.stlouisfed.org/series/MANEMP (showing that since China was admitted to the WTO in 2001, the United States manufacturing jobs have declined by nearly a third).

193. Wood & Mayer, *supra* note 153.

194. OECD, *supra* note 116, at 40.

195. *Id.*

196. Jacob M. Schlesinger & Erin Ailworth, *U.S. Imposes New Tariffs, Ramping Up 'America First' Trade Policy*, WALL ST. J. (Jan. 22, 2018, 10:26 PM), https://www.wsj.com/articles/u-s-imposes-trade-tariffs-signaling-tougher-line-on-china-1516658821.

197. Jack Maidment, *UK Would be Unable to Strike Global Free Trade Deals Without EU Support Under Labour's Brexit Plans*, TELEGRAPH (Feb. 25, 2018, 11:30 AM), https://www.telegraph.co.uk/politics/2018/02/25/uk-would-unable-strike-global-free-trade-deals-without-eu-support/.

free trade protestations from member countries of the European Union, the rise of anti-globalization sentiment is growing.[198] If this problem continues to go unaddressed, it will lead to increased distrust of free trade and could result in a wholesale rejection of free trade—throwing out not only free trade's flaws, but its virtues as well.

## IV. SOLUTIONS

So exactly how can developed countries address the toxic economic conditions brought about by globalization and rapid technological change? As discussed above, the effects of globalization are not negative on a global scale. The average real income of the world citizen has risen considerably over the last thirty years, and, with that, the global standard of living.[199] Further, since the greatest growth in real income has been achieved by those in the bottom two-thirds of the global income distribution, the wealth gap between countries is shrinking.[200]

However, the current economic conditions have also led to exploitation of labor by corporate interests.[201] Corporations can respond to calls for increased wages by relocating jobs to developing countries to cut costs. And because the WTO makes it so difficult for member states to enact protections for domestic jobs, corporations profit at the expense of the poor and lower-middle classes in developed countries while exploiting cheap labor in developing countries.

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198. Alison Smale, *Germans and Austrians Protest E.U. Trade Talks with U.S. and Canada*, N.Y. TIMES (Sept. 17, 2016), https://www.nytimes.com/2016/09/18/world/europe/germans-and-austrians-protest-eu-trade-talks-with-us-and-canada.html.

199. *Adjusted Net National Income Per Capita (Current US$)*, WORLD BANK, https://data.worldbank.org/indicator/NY.ADJ.NNTY.PC.CD (last visited Apr. 20, 2020). Data from the World Bank suggests that the adjusted net national income per capita for the world has more than doubled since the WTO's inception. *Id.*

200. Zsolt Darvas, *Global Income Inequality is Declining – Largely Thanks to China and India*, BRUEGEL (Apr. 19, 2018), https://bruegel.org/2018/04/global-income-inequality-is-declining-largely-thanks-to-china-and-india/.

201. *See* Dani Rodrik, *It's Time to Think for Yourself on Free Trade*, FOREIGN POL'Y (Jan. 17, 2017, 7:57 AM), http://foreignpolicy.com/2017/01/27/its-time-to-think-for-yourself-on-free-trade/ (comparing outsourcing to countries with lax labor laws to "importing" workers from foreign countries and putting them to work under conditions that violate domestic labor, environmental, and safety laws).

Thus, a solution to the problems caused by current economic conditions must address the wealth disparities being created within developed countries, while at the same time being mindful of the benefits that globalization and trade liberalization can create. Below, this Article proposes two possible responses to combat the inequality of gains that liberalized trade has promoted, while dismissing a third response: pulling out of the WTO, which the Trump administration has contemplated.[202]

### A. Withdrawing from the WTO Will Not Solve the Trade Problem

Although this Article paints a bleak picture of the post-globalization world, the benefits of liberalized trade should not be ignored. While not everyone gains from trade liberalization, countries with freer trade tend to have a higher standard of living and grow faster.[203] Increased global trade also leads to closer relationships between countries and has the potential to reduce inter-nation conflict.[204] The goal is to take advantage of these benefits in such a way that all countries and people benefit.

If developed countries began withdrawing from the WTO, as the Trump administration has contemplated, this goal could not be achieved. Even large, developed WTO members such as the European Union and the United States are unlikely to gain anything by withdrawal and re-negotiation of trade relations within the WTO's framework.

First, withdrawing from the WTO will not make other countries more willing to re-negotiate less favorable trade deals. As evidenced by the United Kingdom's withdrawal from the European Union, this is likely to inspire the exact opposite reaction: other countries will draw a hard line

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202. John Brinkley, *Trump May Withdraw U.S. from WTO, Outside Advisor Says*, FORBES (Feb. 13, 2017, 2:06 PM), https://www.forbes.com/sites/johnbrinkley/2017/02/13/trump-may-withdraw-u-s-from-wto-outside-advisor-says/#6a5ba01433bb.

203. *The WTO Can ... Cut Living Costs and Raise Living Standards*, WTO, https://www.wto.org/english/thewto_e/whatis_e/10thi_e/10thi01_e.htm (last visited Nov. 19, 2019); *The WTO Can ... Stimulate Economic Growth and Employment*, WTO, https://www.wto.org/english/thewto_e/whatis_e/10thi_e/10thi03_e.htm (last visited Nov. 19, 2019).

204. *The WTO Can ... Settle Disputes and Reduce Trade Tensions*, WTO, https://www.wto.org/english/thewto_e/whatis_e/10thi_e/10thi02_e.htm (last visited Nov. 19, 2019).

and refuse to negotiate on a withdrawing country's terms.[205] As mentioned above, there has been a dramatic power shift in the WTO over the past twenty-five years. As failed attempts to complete any substantial trade concessions in the Doha Round show, emerging economic powers such as China, India, and Brazil are unlikely to allow developed countries to negotiate one-sided trade deals as they did in the past.[206]

The likelihood of failure to renegotiate mutually beneficial trade deals leads to the second problem: escalating trade wars, in which states enact trade policies that are *too* protectionist.[207] Trade wars, especially between major exporting powers, could lead to a severe reduction in global real income[208] and the loss of millions of jobs.[209] In the end, trade wars hurt consumers most of all. Moreover, a trade war with a rising economic power such as China poses two significant problems: (1) China is the world's fastest-growing export market, which will put severe pressure on other countries' export industries, and (2) China could curtail its purchase of foreign debt, which could result in serious consequences for financial asset prices.[210] As the last few years have shown, retaliatory

205. *See EU Leaders Take a Tough Line in the First Week of Brexit Talks*, ECONOMIST (June 29, 2017), https://www.economist.com/news/britain/21724420-european-governments-are-not-inclined-be-generous-theresa-mays-weak-and-unstable.

206. *See supra* Part II.C.

207. *See* Greg Wright, *Why the US Shouldn't Start a Trade War with China*, CONVERSATION (Aug. 14, 2017, 9:20 PM), http://theconversation.com/why-the-us-shouldnt-start-a-trade-war-with-china-82106.

208. *Id.* (stating global trade war could reduce real incomes around the world by 3.5%).

209. David Nakamura, *The Effect of Trump's Trade Policies? Trade Wars with China, Mexico that Could Cost U.S. 4 Million Jobs, Report Says.*, WASH. POST (Sept. 19, 2016, 1:03 AM), https://www.washingtonpost.com/news/post-politics/wp/2016/09/19/the-effect-of-trumps-trade-policies-trade-wars-with-china-mexico-that-could-cost-u-s-4-million-jobs-report-says/?utm_term=.e4b9a9d5a9e6.

210. *See* Stephen S. Roach, *How to Lose a Trade War*, PROJECT SYNDICATE (Jan. 26, 2018), https://www.project-syndicate.org/commentary/trump-solar-panel-tariffs-by-stephen-s--roach-2018-01.

tariffs weaken international stability[211] and create substantial economic losses.[212]

Ultimately, withdrawing from the WTO poses too large a risk for countries and international stability. While the WTO may certainly have its shortcomings, exiting the system would leave a country with no legal rights or remedies, leading countries into a vicious cycle of retaliatory tariffs and other trade restrictions. Thus, a solution within the confines of the WTO's rules is both necessary and appropriate.

### B. The "Locally Sourced" Environmental Tax

One way in which countries might protect the domestic industry and minimize the extent of outsourcing is by implementing an environmental tax based on the distance goods travel from where they are manufactured to where they are sold. For example, a country might place a one-dollar-per-mile tax on all goods, both foreign and domestically produced. Therefore, if a car is manufactured in Detroit, Michigan and sold in Chicago, Illinois, the environmental tax would be around $300. Similarly, if a car is produced in Monterrey, Mexico and sold in San Antonio, Texas, the environmental tax would be somewhere around $300.

Enacting a blanket tax such as this would likely lead other countries to bring claims that the environmental tax violates GATT Articles I and III.[213] As noted above, Article I of the GATT prohibits countries from imposing duties or charges of any kind that are more favorable to one country than another.[214] This treatment requires that any "advantage, favour, privilege or immunity" granted by any WTO member to products "originating in or destined for any other country [] be accorded immediately and unconditionally to [] like product originating in or destined for the territories of [other countries]."[215] Article III, on the

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211. Witold Gadomski, *Trade Wars Undermine Global Stability*, ASPEN REV. , Jan. 2019, at 15, 18, https://s3.eu-central-1.amazonaws.com/uploads.mangoweb.org/shared-prod/aspeninstitutece.org/uploads/2019/03/ebook_Aspen-Review-1_2019_origin1.pdf.

212. *See* Timothy Meyer, *Trade, Redistribution, and the Imperial Presidency*, 44 YALE J. INT'L L. ONLINE 16, 16 (2018).

213. GATT, *supra* note 22, arts. I, III.

214. *Id*. art. I.

215. *Id*.

other hand, prohibits WTO members from subjecting imported goods to internal taxes in excess of those applied to "like" domestic products.[216]

While a "locally sourced" environmental tax could be implemented without discriminating on its face, the resulting tax could lead to de facto discrimination against WTO members. For instance, were France to levy such a tax on automobiles, cars imported from Germany would be given a definite advantage over Japan or the United States as cars produced anywhere in Germany would be closer to the location of their final sale than any cars manufactured in Japan or the United States. Because the AB has interpreted Article I to cover de facto, as well as de jure, discrimination,[217] the AB would likely find such a tax to violate the GATT.

Likewise, such a tax might be found to violate Article III's "national treatment" requirement. Under GATT Article III, members may not subject products from any other member's territory to internal taxes in excess of those applied to like domestic products, nor may a member dissimilarly tax domestic products and WTO-member products to afford protection when such products are directly competitive or substitutive.[218]

Although the "locally sourced" tax likely violates both Articles I and III, the tax would likely qualify as an Article XX(b) or (g) exception to the GATT.[219] Article XX(b) allows a country to adopt measures that are "necessary to protect human, animal or plant life or health," while Article XX(g) allows measures that "relat[e] to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption."[220] In order for a measure to qualify as an exception under Article XX, it must: (1) fall within the range of an Article XX exception; (2) be necessary to fulfill a State's policy objective; and (3) be applied in conformity with the requirements of the introductory clause of Article XX, or the chapeau.[221]

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216. *Id.* art. III.

217. Appellate Body Report, *Canada – Certain Measures Affecting the Automotive Industry*, ¶ 78, WTO Docs. WT/DS139/AB/R, WT/DS142/AB/R (adopted June 19, 2000).

218. GATT, *supra* note 22, art. III.

219. *See* JENNIFER HILLMAN, CHANGING CLIMATE FOR CARBON TAXES: WHO'S AFRAID OF THE WTO? 10–11 (2013), https://www.climateadvisers.com/wp-content/uploads/2014/01/2013-07-Changing-Climate-for-Carbon-Taxes.pdf.

220. GATT, *supra* note 22, art. XX(b), (g).

221. *US–Gasoline* Panel, *supra* note 69, at 38.

The "locally sourced" tax aimed at reducing carbon emissions would fall under the Article XX(b) exception for protecting human, animal and plant life or health as the contours of this exception to the GATT have provoked little controversy within the WTO dispute system. While there is a question as to whether WTO parties can protect or care about human, animal or plant health or life outside of their own territories, there is a clear jurisdictional nexus for measures aimed at lowering carbon emissions. Pollution generated outside of a State's territory likely will have a direct effect on that State, insofar as the ramifications of pollution do not stop at State borders. Pollution from Chinese factories makes its way into South Korea, Japan, and even the western United States.[222] Even putting this to the side, the act of transporting the goods into a State enacting a "locally sourced" tax would accord that country's legislative jurisdiction. As the Grand Chamber of the European Court of Justice held in regard to the European Union Directive 2008/101,[223] by physically entering the territory of a country, others are subject to the jurisdiction of that country.[224]

A "locally sourced" tax would also likely satisfy the "necessary" component of Article XX(b). Determination of whether a measure is necessary involves weighing and balancing the facts surrounding the measure, including: (1) the importance of the common interests or values protected; (2) the contribution of the measure to the ends pursued; and (3) the impact of the measure on imports or exports.[225] As the WTO Panel noted in *Brazil – Measures Affecting Imports of Retreaded Tyres*,

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222. Matthew Kahn, *As Incomes Rise in China, So Does Concern About Pollution*, CONVERSATION (Oct. 24, 2016, 10:32 PM), https://theconversation.com/as-incomes-rise-in-china-so-does-concern-about-pollution-65617.

223. Directive 2008/101/EC, of the European Parliament and of the Council of 19 November 2008 Amending Directive 2003/87/EC so as to Include Aviation Activities in the Scheme for Greenhouse Gas Emission Allowance Trading Within the Community, 2009 O.J. (L 8) 3. Directive 2008/101 was an aviation emissions regulation scheme covering flights arriving in or departing from an airport within the European Union. *Id.* The Directive provided that emissions would be calculated on the entire length of the flight, and thus, was regulating airlines even when they were not physically within the European Union's jurisdiction. *Id.*

224. *See* Case C-366/10, Air Transp. Ass'n of Am. v. Sec'y of State for Energy & Climate Change, 2011 E.C.R. I-13755, I-13892, 49 C.M.L.R. 1113 (2011).

225. *See* Appellate Body Report, *Brazil – Measures Affecting Imports of Retreaded Tyres*, ¶ 142, WTO Doc. WT/DS332/AB/R (adopted Dec. 17, 2007) [hereinafter *Brazil–Tyres* Appellate].

"few interests are more 'vital' and 'important' than protecting human beings from health risks, and that protecting the environment is no less important."[226] Thus, the importance of the interests protected by the tax would be at its highest. A measure contributes to the achievement of its objective "when there is a genuine relationship of ends and means between the objective pursued and the measure at issue."[227] A "locally sourced" tax predicated on reducing carbon emissions would contribute to reducing pollution by encouraging consumers to buy products manufactured closer to home since those shipped from far away would come with a higher price tag.

The "locally sourced" tax would also fall under the Article XX(g) exception for the conservation of exhaustible resources as related to the conservation of the earth's climate, along with plants and animals that might disappear as a result of climate change.[228] The AB has held that the term "natural resource" is evolutionary and must be interpreted in light of contemporary concerns of countries regarding the protection of the environment.[229] Given the current international concern about climate change,[230] the WTO would assuredly consider the Earth's climate and the potential of climate change-induced extinction of animal and plant life as falling under the purview of this exception.

The more difficult task for the "locally sourced" tax will be passing the twin requirements of Article XX's chapeau: (1) no arbitrary discrimination or unjustifiable discrimination between countries where the same conditions prevail and (2) no disguised restriction on trade.[231] While few measures have survived the chapeau's scrutiny, the "locally sourced" tax is different from many of the failing measures because it

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226. Panel Report, *Brazil—Measures Affecting Imports of Retreaded Tyres*, ¶7.108, WTO Doc. WT/DS332/R (adopted Dec. 17, 2007).

227. *Brazil–Tyres* Appellate, *supra* note 225, at ¶ 145.

228. HILLMAN, *supra* note 219, at 11.

229. *US–Shrimp*, *supra* note 64, at ¶130.

230. *See* E.A. Crunden, *EU Will Only Make Trade Deals with Nations that Ratify Paris Climate Agreement*, THINK PROGRESS (Feb. 6, 2018, 5:01 PM), https://thinkprogress.org/eu-paris-us-decd4aad9145/ (stating that European countries view pulling out of the Paris Climate Accord as good reason not to conclude a trade deal with the United States).

231. *See* Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline*, 23–29, WTO Doc. WT/DS2/AB/R (adopted May 20, 1996).

would also create additional costs for domestic producers.[232] Unlike other measures that have failed for imposing inflexible standards or coercing the policy decisions of foreign governments, the "locally sourced" tax does not force foreign countries to adopt the standards of the implementing country.[233] Here, producers would still be free to export and import goods to and from an implementing country—it would only encourage producers to manufacture in that country to benefit from lower taxes, but not force them to. Implementing legislatures would, therefore, be wise to make clear that the tax was adopted for reasons relating to the environment or human health.[234]

The "locally sourced" tax provides countries with a solution to two of the problems often associated with free trade and the WTO: its distributional impact on economies and Member States' ability to regulate the environment. The tax not only penalizes companies engaging in practices that require the shipping of goods over long distances, but it also encourages companies to produce locally for each market, benefitting the local economy. With such a policy in place, if a South Korean auto manufacturer wants cheaper access to the German market, it might build a factory in Germany, thereby stimulating Germany's economy.

### C. Wage Subsidies

Subsidies provide another valuable tool for legislators to combat the comparative advantage that many developing countries have over developed countries. Under the WTO Agreement on Subsidies and Countervailing Measures, subsidies are divided into a three-pronged "traffic light" system.[235] "Export subsidies and subsidies contingent on the use of domestic products" are "red light" subsides and are prohibited.[236] "Subsidies that are not 'specific' or that offer specific

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232. HILLMAN, *supra* note 219, at 11.

233. *See US–Shrimp*, *supra* note 64, at ¶ 161 (holding that the United States' shrimp harvesting regulations constituted unjustifiable discrimination because they were inflexible and required other WTO Members to "adopt essentially the same policies and enforcement practices as the United States").

234. HILLMAN, *supra* note 219, at 11.

235. PIETRO PORETTI, THE REGULATION OF SUBSIDIES WITHIN THE GENERAL AGREEMENT ON TRADE IN THE SERVICES OF THE WTO 30 (2009).

236. PAUWELYN ET AL., *supra* note 29, at 425.

forms of assistance for 'research activities,' 'disadvantaged regions,' or adaptation to 'new environmental requirements'" are "green light" subsidies, which are explicitly permitted and cannot be challenged at the Dispute Settlement Understanding (DSU) or lead to countervailing measures.[237] All other subsidies are "orange light" subsidies that can be challenged directly at the DSU or lead to countervailing measures.[238]

As mentioned above, to address the wealth redistribution problem created by trade liberalization, policies should be designed so that their benefits accrue to those who bear the adverse effects of free trade. Thus, subsidies should be designed to maximize economic gains for the low and middle classes in developed countries and laborers in developing countries. A wage subsidy for employees is ideal as it goes directly to the group that needs it most, bypassing the risk of trickle-down subsidies being pocketed by companies.[239]

A subsidy contingent on paying all workers a certain minimum wage could be beneficial to citizens of both developed and developing countries. For example, if a subsidy is conditioned on a company paying all of its workers $9 per hour, one of two things happens. First, there could be a reduction in low-skilled manufacturing jobs being offshored. If the subsidy contains sufficient incentives, corporations might find it more efficient to maintain more manufacturing plants in developed countries. This would be a huge boon to the most vulnerable segment of the population in developed countries.

The second possible reaction to such a subsidy is an improved standard of living for those in developing countries. In instances where a developing country still has a comparative advantage despite the requirements for obtaining the subsidy making a developed country's minimum wage more competitive, the granting of subsidies would improve the welfare of those in developing countries. Although this might strike some as a form of inter-nation welfare whereby developing countries subsidize the workforce in a foreign country, it would be no

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237. *Id.* at 425–26.

238. *Id.* at 426.

239. *See* Seth Hanlon & Alexandra Thornton, *Trickle-Down Tax Cuts Don't Create Jobs*, CTR. FOR AM. PROGRESS (Aug. 24, 2017, 12:01 AM), https://www.americanprogress.org/issues/economy/reports/2017/08/24/437625/trickle-tax-cuts-dont-create-jobs/ (showing that tax cuts for corporations and the wealthiest have resulted in weak economic growth).

different from the aid that countries like the United States already provide to many third world countries,[240] except in this case, the money would go directly to the people, and not the government.[241] Such a direct form of aid to developing countries is potentially more efficient and will do more to stimulate these countries' economies in the long run.[242] As Nobel Prize-winning economist Angus Deaton has argued, foreign aid to developing countries might actually weaken a country because the influx of money can make governments less accountable to the people as they no longer need to rely on collecting taxes to run the country.[243]

The problem with subsidies is that if they are "specific"—that is, if they appear to be targeted towards aiding a particular industry or industries—and if the subsidy causes injury to a domestic producer, they are actionable and other countries can impose countervailing duties on goods that benefit from a subsidy.[244] Thus, a country wanting to subsidize incomes might have to grant subsidies to a wide range of industries, including industries that might not need to be subsidized. Such a broadly implemented subsidy could prove exceedingly costly to a government, leading to money being taken away from other areas of public funding, such as social programs or infrastructure.

One solution to this problem could be the revival of explicit "green light" subsidies that expired on January 1, 2000, and adding wage subsidies to that list.[245] The restoration of expressly legal subsidies and the addition of wage subsidies to that list might be difficult given the power shift within the WTO and the lack of consensus among countries during the Doha Round.[246] However, rising wages in China might be used as leverage in gaining China's support for green-lighting wage subsidies. If China and other developing countries that have seen wage

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240. *See* Liz Schrayer, *The Surprise Bipartisan Success Story of Congress: American Aid*, TIME (Sept. 13, 2016, 10:26 AM), http://time.com/4487397/bipartisan-success-congress/.

241. *See* Ana Swanson, *Why Trying to Help Poor Countries Might Actually Hurt Them*, WASH. POST (Oct. 13, 2015, 2:52 PM), https://www.washingtonpost.com/news/wonk/wp/2015/10/13/why-trying-to-help-poor-countries-might-actually-hurt-them/?utm_term=.251e8cf482e7.

242. *See id.*

243. *See id.*

244. PAUWELYN ET AL., *supra* note 29, at 460–61.

245. PAUWELYN ET AL., *supra* note 29, at 426.

246. *See supra* Part II. C.

spikes in recent years fear a second wave of outsourcing, from developing countries to least developed, support for wage subsidies might have broader support than just from developed countries. Were wage subsidies to be explicitly legalized by the WTO, both developed and developing countries could utilize them to spur domestic job growth and ensure that working-class citizens received the benefits of increased world trade.

## V. CONCLUSION

As President Obama stated, rising income inequality is the "defining challenge of our time."[247] At the same time, President Obama's former economic advisor, Larry Summers, argued that "the basic responsibility of government is to maximize the welfare of citizens, not to pursue some abstract concept of the global good."[248] It is important to keep these statements in mind when developing a solution for the imbalances caused by free trade. Although globalization and free trade have played major roles in increasing global economic gains, the unequal distribution of these gains threatens to lead countries down the path of isolationism, protectionist policies. Therefore, this Article has argued that both individual countries and the WTO should pursue policies that create a more equitable distribution of wealth. Free trade can be a powerful force for global good, but it has to work for everyone.

247. Jim Newell, *Obama: Income Inequality is 'Defining Challenge of Our Time' – Live*, GUARDIAN (Dec. 4, 2013, 1:52 PM), https://www.theguardian.com/world/2013/dec/04/obama-income-inequality-minimum-wage-live.

248. Summers, *supra* note 176.